Supreme Court, U. S.
FILED
FEB 23 1980
MICHAEL RODAK, JR., CLERK

79-1304

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No.

CITY OF NEW YORK,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALLEN G. SCHWARTZ,
Corporation Counsel,
Attorney for Petitioner
100 Church Street,
New York, N.Y. 10007
(212) 566-5876 or 4338

L. KEVIN SHERIDAN,
ISAAC KLEPFISH,
of Counsel.

INDEX

	Page
The Opinion Below	1
Jurisdiction	2
Question Presented	2
Constitutional and Statutory Provisions	2
Preliminary Statement	4
Statement of the Case	5
Argument	
The Coast Guard Does Not Have Jurisdiction To Impose Penalties On The City For Violations Of §1321.	7
Conclusion	21

CITATIONS

Cases:

Greenspan v. Crosbie, Fed. Sec. L. Rep. (CCH ¶ 95, 780	10,11
In Re Equity Funding, 416 F. Supp. 161 (C.D. Cal. 1976)	10,11,12
In Re New York City Municipal Securities Litigation, MDL Docket No. 314 (SDNY 1980)	10,11
Monell v. Department of Social Services of The City of New York, 436 U.S. 658 (1978)	8,12
Power Reactor Development Co. v. International Union of Electricians, 367 U.S. 408 (1960)	17
Udall v. Tallman, 380 U.S. 1 (1964)	17
United States of America v. Massachusettes Bay Transportation Authority, Index No. 79-1512 (1st Cir. 1980)	20
Ward v. Coleman, 598 F. 2d 1187 (10th Cir. 1979)	15,20

STATUTES

Federal Water Pollution Control Act. 33 U.S.C. §1261, et seq.	
Section 1311	14
Section 1321(a)	2,3,4,7,
Section 1321(b)	3,5,6,15
Section 1321c (2)(g)	14
Section 1321 (e)	14
Section 1321 (m)	18
Section 1321 (o)2	14
Section 1362 (5)	9,10

APPENDICES

1. Order of the United States Court of Appeals for the Second Circuit, dated November 26, 1979. 1a

2. Decision of the United States District Court, Southern District of New York, dated March 7, 1979 3a

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

----------X

CITY OF NEW YORK,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

----------X

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Opinion Below

The Court of Appeals for the Second Circuit Affirmed on the opinion below, and did not render its own opinion. The Court's affirmance is attached hereto as Appendix I and the District Court's opinion is attached hereto as Appendix II.

Jurisdiction

The decree sought to be reviewed is dated and entered November 26, 1979.

The Court has jurisdiction to review the decree in question by writ of certiorari pursuant to 28 U.S.C. §1254(1).

Question Presented

Whether the City of New York is a "person" for the purposes of 33 USC §1321 of the Federal Water Pollution Control Act of 1972 and, thus, whether the United States Coast Guard has jurisdiction over the City to assess it penalties for violations of that statute.

Relevant Constitutional and Statutory Provisions

Federal Water Pollution Control Act, 33 USC §1321

(a)(4) "owner of operator" means in the case of a vessel, any person owning

operating, or chartering by demise, such vessel, and (b) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility....

(a)(7) "person" includes an individual, firm, corporation, association, and a partnership.

(b)(3) The discharge of oil or hazardous substances into or upon the navigable waters of the United States....is prohibited....

(b)(6) Any owner or operator of any vessel, onshore facility or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard

is operating of not more than $5,000 for each offense...

Preliminary Statement

This Court is presented with the opportunity to consider a question of first impression and a question involving a principle of wide application; namely, the reach of 33 USC §1321, a part of the Federal Water Pollution Control Act of 1972. The Court of Appeals, in affirming the District Court's decision, is of the view that strict liability is to be imposed for oil spills into the navigable waters not only upon business concerns but also upon municipal corporations. The Court of Appeals in affirming the District Court decision interpreted the definition of the term "person" contained in §1321(a)(7) to also include municipal corporations. Petitioner con-

tends, however, that Congress intended to exclude municipalities from the penalty provisions for oil discharges. This interpretation is based upon the legislative purpose of §1321, the text of §1321 and the overall language of the Federal Water Pollution Control Act.

Statement Of The Case

Commencing on July 11, 1975 and thereafter on four different occasions, the Coast Guard determined that City owned facilities were the source of five oil spills into the navigable waters. The City was notified by the Coast Guard that these oil spills violated §1321(b)(3) of the FWPCA.

The City requested hearings on the charges and claimed, inter alia, that it was not subject to the jurisdiction of the Coast Guard for the alleged violations and

thus not liable for penalties. The Coast Guard rejected this claim and imposed penalties upon the City pursuant to §1321 (b)(6) of the FWPCA. These decisions were all affirmed on appeal by the appropriate administrative bodies.

Based on its position, the City refused to pay the penalties. Accordingly, on July 12, 1978, the United States instituted an action seeking payment of the penalties. The City filed a motion to dismiss the complaint on August 3, 1978, and, the District Court, in a decision dated March 7, 1979, denied the motion. The District Court concluded that the City was included within the term "person" in §1321. (A copy of the District Court's decision is annexed hereto as Appendix II). Since there was no factual dispute, the City agreed to the filing of an Order and Judgment on consent declaring

the City liable for the penalties. This Order and Judgment was filed on May 24, 1979.

The City appealed the final Order and Judgment to the Court of Appeals for the Second Circuit on July 12, 1979. The Court of Appeals affirmed the District Court's decision on November 26, 1979.

ARGUMENT

THE COAST GUARD DOES NOT HAVE JURISDICTION TO IMPOSE PENALTIES ON THE CITY FOR VIOLATIONS OF §1321.

The Court of Appeals in affirming the District Court's decision has concluded that notwithstanding the entities enumerated within the term "person", as defined in §1321(a)(7), are limited to business entities, a municipal corporation is included within the term "person" and is subject to the penalty. This in-

clusion of a political entity within the enumerated group as a "person" is predicated on the fact that either a municipal corporation is included within the enumerated term "corporation" or that the word "includes" utilized in the definition is meant to be applicable to municipal corporations. While petitioner does not quarrel with the proposition that the term "person" has been construed to include municipal corporations, see, e.g., Monell v. Department of Social Sevices of the City of New York, 436 U.S. 658 (1978), or that the term "corporation" has been construed to mean a municipal corporation, or that the term "include" has been construed to indicate additions to those enumerated, petitioner respectfully submits that the overall language in §1321 and of the FWPCA, and the legis-

lative history of §1321, indicate that the term "person" in §1321 was not intended to include political entities.

The entities enumerated within the definition of the term "person" in §1321 includes "an individual, firm, corporation, association and a partnership." Clearly, the sense of this enumeration is that the statute is directed towards individuals and business concerns, not governmental entities. Certainly, if governmental entities were meant to be included, Congress could have easily thus expressed itself, without leaving the question subject to implication or speculation. Indeed, in §1362(5) of the FWPCA, Congress explicitly did so. "Person" therein "means an individual, corporation, partnership, association, State, Municipality, Commission, or political subdivision of a State, or any interstate body." There

is no logical reason for Congress to leave the term "person" in §1321 subject to inferences and speculation when Congress could just as well have defined "person" therein consistent with §1362(5).

Significantly, in analogous situations, such as in the securities field, the courts have held that the different meaning given a term within the context of a comprehensive statutory framework signifies a Congressional intention to exclude. See, In Re New York City Municipal Securities Litigation, MDL Docket No. 314, (S.D.N.Y. 1980); Greenspan v. Crosbie, [1976-1977 transfer binder] Fed. Sec. L. Rep. (CCH), ¶95, 780 (S.D.N.Y. 1976); In Re Equity Funding Corp. of America Securities Litigation, 416 F. Supp. 161 (C.D. Cal. 1976). These Courts, in deciding that §10(b) of the 1934 Securities Act did not

apply to governmental entities, reasoned:

> "This definition of "person" [§3(a)(9) of the 1934 Act] does not, by its terms, apply to municipalities, states or the federal government. Nor can such entities be included by implication. This is clear from a comparison of §3(a)(9) of the 1934 Act with §2(2) of the 1933 Act. 15 U.S.C §77b(2) in which Congress expressly included governmental entities...." In Re New York City, supra, at p. 18.

> "It is significant that the earlier Securities Act of 1933 defines 'person' as 'an individual, a corporation, a partnership, an association, a joint stock company, a trust, any unincorporated organization, or a government or political subdivision thereof.' 15 U.S.C. §77b(2). The definition in the 1934 Act virtually parallels this language, with the important exception that governments are excluded. This omission was surely not accidental. Congress obviously intended to exclude governments from liability for violations of the 1934 Act." Greenspan, supra at 90,827

> "'Person,' for purposes of determining who may be liable under §10(b), is defined in §3(a)(9) of the 1934 Act as:

> 'an individual, a corporation, a partnership, an association a joint-stock company, a business trust, or an unincorporated organization.'
> This is in contrast to §2(2) of the 1933 Act that includes 'a government or political subdivision thereof' within its defintion of 'person.' The definition of 'person' provided by §3(a)(9) simply does not encompass states or their agencies." Equity Funding. supra, 416 F. Supp. at 198.

see, also, Monell v. Dept. of Social Services of the City of New York, 532 F. 2d 259, 263, n. 3, (2d Cir. 1976), rev'd on other grounds, 436 U.S. supra.

The Court of Appeals' apparent reliance on the term "include" as indicating a more expansive definition than the enumerated entities is not determinative. Petitioner agrees with the proposition that the term "includes" signifies more. But, where is it implicit in that term that

the inclusion extends to entities not related to those enumerated? There are additional types of business concerns such as a joint-stock company, a business trust or an unincorporated organization and Congress instead of enumerating all these types of business concerns utilized the work "include."

Additionally, the legislative history of §1321 supports the view that the section is directed at the shipping and oil industries and the abuses connected with their operations which were of concern to Congress, not at the operation of municipal ferries or incinerators or other facilities. Thus, Respresentative Wright, in emphasizing the purpose of the oil pollution statute in the Water Quality Improvement Act of 1970, the predescessor to §1321, stated:

> "However, several recent instances such as the breaking of the tanker Torrey Canyon off the coast of England and misfortune of the SS Ocean Eagle off the Puerto Rican coast and most recently the despoliation of California beaches by oil from an offshore drilling rig, have indicated to us that we need the capacity to do much more than the oil pollution act of 1924 permits."

115 Cong. Rec. 9025 1969.

Significantly, throughout the FWPCA Congress is proceeding on the theory that water pollution control of this type constitutes a cooperative federal, state and local endeavor. See, e.g., §§1311, 1321 subdivisions (c)(2)(g), (e) and (0)(2). And, in fact, the typical method chosen by Congress in solving problems of this magnitude is through the cooperative efforts of federal state and local governments, to wit, by negotiation, funding for research,

the establishment of timetables and, if necessary, seeking injunctive relief. There is simply no basis to support the proposition that with regard to oil pollution this cooperative endeavor should be displaced by the imposition of strict liability for oil discharges. This argument is all the more compelling in light of the recent decision by the Court of Appeals for the 10th circuit in Ward v. Coleman, 598 F. 2d 1187 (10th Cir. 1979), concluding that the penalties contained in §1321(b)(6) are criminal in nature. Certainly, had Congress wished to impose strict criminal penalties on municipal corporations, it would have done so in clear language.

Finally, the Court of Appeals' affirmance fails to come to grips with the resulting anomaly of its decision,

namely, the apparent different treatment afforded different political entities by Congress in §1321. Specifically, it cannot seriously be argued that States are included within the term "person" contained in §1321 or the entities enumerated therein. Certainly, had Congress intended to include States in these provisions Congress would have defined "person" in a more precise manner rather than leaving the issue to speculation and implication. Additionally, the United States Coast Guard, the agency charged with administering the provisions of §1321, has issued regulations for the enforcement of §1321 in which the Coast Guard concludes that States and unincorporated political subdivisions are excluded from the penalty provisions of §1321 since these entities are not "persons" or "corporations". Certainly, the

Coast Guard interpretation is entitled to at least considerable deference. Udall v. Tallman, 380 U.S. 1, 15, 16 (1964). This is particularly so when the administrative practice act at stake,"

> "...involves a contemporaneous construction of a statute by the men charged with the responsibility, setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new."

380 U.S., supra; see, also Power Reactor Development Co. v. International Union of Electricians, 367 U.S. 408 (1960).

Because of this exclusion of certain governmental entities, the argument that the exclusion of municipal corporations from §1321 would render the definitions of "vessel" and "public vessel" superflous is incorrect. The excluded governmental entities, such as the United States, states and unincorporated political subdivisions

are enumerated within the definition of "public vessel". Thus, to paraphrase the District Court, "what sense does it make to exempt the vessels owned by the United States, the States and unincorporated political subdivisions that are not used in commerce if these entities, themselves, are not persons within the meaning of §1321 (a)(7)". Additionally, Section 1321 does not merely impose penalties for oil spills and the like, but also provides for numerous other things, including granting the Coast Guard authority to board vessels -- except public vessels. (See, §1321(m). While under §1321 a publicly owned vessel engaged in commerce may be boarded, it does not at all follow that Congress intended to to further and impose liability on the governmental owners of such vessels or

other facilities where the Act otherwise indicates just the opposite.

More fundamentally, however, the exclusion of States and other political entities evidences that Congress created exemptions from the penalty provisions of §1321 and that these exemptions do not defeat any Congressional purpose in that section. Thus, the sole reason for including municipal corporations within §1321 and affording it different treatment from the other excluded political entities, is simply because municipal corporations are sometimes referred to as "corporations", while the other political entities are not. Clearly, such a distinction has nothing to commend it in terms of common sense, the general scheme and overall language of the statute, or the statute's legislative history.

In conclusion, this case presents the Court with the opportunity to rule on a question of first impression: the reach of §1321. The issue is now active in other circuits* and the Court has the opportunity to rule on the question and to clarify the rule for the circuits. Also presented is the opportunity to determine an important question of federalism, namely, whether Congress intended to infringe upon the powers of the States by imposing upon governmental entities strict liability or, as the Court of Appeals in Ward v. Coleman, supra, concluded, criminal penalties, rather than utilizing the traditional method adopted by

*The First Circuit on February 4, 1980, in United States of America v. Massachusettes Bay Transportation Authority, Index No. 79-1512 (1st Cir. 1980), reversed a lower court decision and concluded that the defendant there, a public authority, was a "person" for purposes of §1321.

Congress in resolving disputes with States and localities.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

ALLEN G. SCHWARTZ
Corporation Counsel
Attorney for Petitioners
100 Church Street
(212) 566-5876 or 4338
New York, New York 10007

By: L. KEVIN SHERIDAN
Assistant Corporation Counsel

ISAAC KLEPFISH
Assistant Corporation Counsel

A P P E N D I C E S

APPENDIX A

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the opinion below of the Hon. Lee P. Gagliardi, 78 Civ. 2681 (Mar. 7, 1979).

WILLIAM H. MULLIGAN
William H. Mulligan

THOMAS J. MESKILL
Thomas J. Meskill

AMALYA L. KEARSE
Amalya L. Kearse

DECISION OF DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-against-

CITY OF NEW YORK,

Defendant.

78 Civ. 2681

MEMORANDUM DECISION

GAGLIARDI, D.J.

This is an action to recover civil penalties assessed by the United States Coast Guard against the City of New York (the "City") for discharges of oil into the navigable waters of the United States in violation of the Federal Water Pollution Control Act of 1972 ("FWPCA"), 33 U.S.C. §1321(b)(3). Jurisdiction is pre-

mised upon 33 U.S.C. §1321(n). The City has moved to dismiss the complaint for failure to state a claim. Rule 12(b)(6), Fed. R. Civ. P. The motion is denied.

The allegations of the complaint, deemed true for the purposes of this motion, are as follows: On five separate occasions between July 11, 1975 and July 9, 1976, a discharge of oil into the navigable waters of the United States occurred from a City owned or operated vessel or facility. On each occasion, the District Commandar of the Third Coast Guard District assessed a civil penalty against against the City pursuant to 33 U.S.C. §1321(b)(6), which assessment was affirmed, on appeal, by the Commandant of the United States Coast Guard. The aggregate amount of the penalties assessed in $1200.00. The City has not paid the amount due.

The City has moved to dismiss the complaint on two separate grounds: 1. that the City is not an "owner, operator or person" as defined by 33 U.S.C. §1321(a) and thus cannot be assessed a civil penalty pursuant to §1321 (b)(6) and 2. that three of the penalties assessed are invalid because the Coast Guard failed to show fault on the part of the City and the statute does not impose strict liability for oil discharges.

Liability of Municipal Corporations for Civil Penalties Pursuant to §1321(b)(6)

The FWPCA, a modification of the 1970 Water Quality Improvement Act ("WQIA"), is a "comprehensive plan attempting to expedite oil pollution cleanup and to establish a workable scheme for limiting and distributing liability." Tug Ocean Prince, Inc.

v. United States, 584 F. 2d 1151, 1162 (2d Cir. 1978). The board policy of the Act is that "there should be no discharge of oil or hazardous substances into or upon the navigable waters of the United States . . . ." 33 U.S.C. §1321(b)(1), and "[t]he discharge of oil or hazardous substances. . . into or upon the navigable waters of the United States. . . in harmful quantities as determined by the President. . . is prohibited." Id. §1321 (b)(3). Owners or operators of vessels and onshore or offshore facilities are liable for clean-up costs, subject to the defenses of act of God, act of war, negligence of the United States government, or the act or omission of a third party. Id. §1321(f). If the discharged substance is nonremovable, the owner or operator is

liable for a civil penalty of varying amount dependent upon the amount and toxicity of the substance spilled and subject to the four defenses enumerated above. Id. §1321 (b)(2)(B). Finally, 33 U.S.C. §1321(b)(6), the provision at issue in this case, makes "any owner, operator, or person" in charge of any onshore facility, offshore facility or vessel from which oil is discharged liable for a civil penalty of up to $5,000, in an amount to be determined by the Coast Guard.

Resolution of the City's first ground for dismissal turns upon an interpretation of the definitional sections of the act. For the purpose of 33 U.S.C. §1321, the term "owner or operator"

> means (A) in the case of a vessel, any person owning, operating, or chartering,

> by demise, such vessel, and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility and (C) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to abandonment.

33 U.S.C. §1321(a)(6). Moreover, 33 U.S.C. §1321(a)(7) states that:

> "person" includes an individual, firm, corporation, association, and a partnership.

The City contends that §1321(a)(7)'s failure to enumerate municipalities among the alternative definitions of "person" indicates that Congress intended to exclude municipalities from the scope of the FWPCA.

The starting point for questions of statutory interpretation must be the words of the statute itself. See, e.g., Ernst &

Ernst v. Hochfelder, 425 U.S. 185, 198-99 (1976). Although §1321(a)(7) does not specifically include municipalities within its definition of "persons" potentially liable under the Act, it does not specifically exclude such entities either. Indeed,

> [t]he word "includes" is usually a term of enlargement, and not of limitation. . . It therefore conveys the conclusion that there are other items includable, though not specifically enumerated by the statute.

Argosy Limited v. Hennigan, 404 F. 2d 14, 20 (5th Cir. 1968), citing Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U.S. 95 (1941); United States v. Gertz, 249 F. 2d 662, 666 (9th Cir. 1957).

If municipalities were not included within the statutory definition of "persons", other portions of §1321 would be

rendered superfluous. Operators and owners of vessels which discharge oil and other hazardous substances are subject to the various liabilities and penalties set forth in that section. The statute defines "vessel" to mean

> every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water other than a public vessel.

33 U.S.C. §1321(a)(3) (emphasis added). The term

> "public vessel" means a vessel owned or bareboat chartered and operated by the United States, or by a State or political subdivision thereof, or by a foreign nation, except when such vessel is engaged in commerce.

Id. §1321(a)(4) (emphasis added). Congress, therefore, clearly intended to subject municipally-owned vessels that are engaged in

commerce to the penalties set forth in the remainder of §1321. It would make no sense to exempt municipally-owned vessels that are not used in commerce if the municipalities, themselves, were not "persons" within the meaning of §1321(a)(7). "Every word used in a statute is presumed to have a meaning, and, if possible, every word must be accorded significance and effect." Argosy Limited v. Hennigan, supra, 404 F. 2d at 20, citing General Motors Acceptance Corp. v. Whisnant, 387 F.2d 774 (5th Cir. 1968).

Including municipalities within the statutory definition would also accord with legislative intent. The expressed Congressional policy that there be no discharges of oil is absolute on its face. See 33 U.S.C. §1321(b)(1), quoted supra.

"There are no qualifications or exemptions suggested in the foregoing statement of policy. Similarly, in defining the terms used in the Act, Congress chose language of sweeping inclusiveness." United States v. Buntin, 11 E.R.C. 1061 (M.D. Tenn. 1976). The legislative history of the definitional sections of the Act also supports this construction. The House of Representatives' version of the WQIA specifically excluded federal or state-owned facilities from liability for oil discharges. H. Rep. No. 91-127, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Congr. & Adm. News 2702-03. These exclusions were subsequently deleted by the Joint Conference Committee. Conf. Report No. 91-940, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Congr. & Adm.

News 2724-25. Although no specific reason was given for this deletion, it cannot be assumed that it was without significance.

The parties have not cited any case which has decided this precise issue, and the court's own research has not found one, but that may be attributable to the fact that the courts have simply assumed the FWPCA to be applicable to municipalities. See, e.g., City of Pawtucket v. United States, 10 E.R.C. 2070 (Ct. Cl. 1976). In light of the plain meaning and structure of the Act, its legislative history and the avowed Congressional purpose for its enactment, the court finds that assumption well warranted.

B. The Liability for Civil Penalties Without Fault

The City's second ground for dismissal,

that liability may not be imposed for civil penalties pursuant to 33 U.S.C. §1321(b)(6) without a finding of fault and that the Coast Guard found no negligence on the City's part on three of the occasions alleged in the complaint, is not cognizable on a motion to dismiss pursuant to Rule 12 (b)(6). The legal sufficiency of the complaint is the sole matter in issue on such a motion and the complaint does not set forth the Coast Guard's conclusions of law. Although the City has not moved for summary judgment, it has submitted a copy of a decision by the Acting Chief Counsel of the United States Coast Guard in which a "strict liability" standard is applied. Treating the City's second ground for dismissal as a motion for partial summary judgment, the motion is denied.

"The civil penalty provision [of 33 U.S.C. §1321(b)(6)] is clearly one of strict liability. . . and every court which has considered the question has so held." United States v. Marathon Pipe Line Co., 12 E.R.C. 1588, 1590 (7th Cir. Dec. 22, 1978), citing Tug Ocean Prince, Inc. v. United States, 436 F. Supp. 907, 924 (S.D.N.Y. 1977), aff'd in part & rev'd in part, 584 F.2d 1151 (1978); United States v. Atlantic Richfield Co., 429 F. Supp. 830, 836-37 (E.D. Pa. 1977); Ward v. Coleman, 423 F. Supp. 1352, 1357 (W.D. Okla. 1976): United States v. General Motors Corp., 403 F. Supp. 1151, 1157 (D. Conn. 1975); United States v. Eureka Pipeline Co., 401 F. Supp. 934, 942 (N.D. W. Va. 1975).

Conclusion

The City's motion is denied in all respects.

So Ordered.

_____

U.S.D.J.

Dated: New York, New York
March 7, 1979.

Supreme Court, U. S.
FILED
APR 21 1980
MICHAEL RODAK JR. CLERK

No. 79-1304

In the Supreme Court of the United States

OCTOBER TERM, 1979

CITY OF NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

ANNE S. ALMY
GAIL OSHERENKO
Attorneys
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1304

CITY OF NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 2a) is not reported. The decision of the district court (Pet. App. 3a-16a) is reported at 481 F. Supp. 4.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 1979. The petition for a writ of certiorari was filed on February 23, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the City of New York is a "person" liable for civil penalties, pursuant to 33 U.S.C. 1321, for spilling harmful quantities of oil into navigable waters of the United States.

STATUTES INVOLVED

33 U.S.C. 1321[1] provides in pertinent part:

(a) For the purpose of this section, the term—

* * * * *

(6) "owner or operator" means (A) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility, and (C) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment;

(7) "person" includes an individual, firm, corporation, association, and a partnership;

* * * * *

(b)(1) The Congress hereby declares that it is the policy of the United States that there should be no

[1]Section 1321 was first enacted as an amendment of the Federal Water Pollution Control Act by the Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 (formerly codified at 33 U.S.C. 1161), and was incorporated into and modified by Section 311 of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 862. The Section was later modified, in ways that have no bearing on the issues of this case, by Section 57 of the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1593, and Section 1(b) of the Federal Water Pollution Control Act Amendments of 1978, Pub. L. No. 95-576, 92 Stat. 2467. Since enactment of the Clean Water Act of 1977, the Federal Water Pollution Control Act has commonly been referred to as "the Clean Water Act." Thus, we will refer to it as "the Clean Water Act" or "the Act." In addition, citations in this brief to specific sections of the Act will refer to those sections as they appear in the 1976 edition of the United States Code.

discharges of oil or hazardous substances into or upon the navigable waters of the United States * * *.

* * * * *

(3) The discharge of oil or hazardous substances into or upon the navigable waters of the United States * * * in harmful quantities as determined by the President under paragraph (4) of this subsection, is prohibited * * *.

* * * * *

(6) Any owner or operator of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. * * *

33 U.S.C. 1362 provides in pertinent part:

Except as otherwise specifically provided, when used in this chapter:

* * * * *

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

STATEMENT

The United States brought this action under 33 U.S.C. 1321(b)(6) to recover $1,200.00 in civil penalties assessed against the City of New York in respect of five separate discharges of harmful quantities of oil, in violation of the Clean Water Act, 33 U.S.C. 1321(b)(3).

The facts are not in dispute. The oil spills which formed the basis for the complaint occurred between July 11, 1975, and July 9, 1976. Three discharges were from onshore facilities owned and operated by the City (a municipal incinerator in the Bronx, a ferry terminal, and an unoccupied building scheduled for demolition). Two discharges were from a ferry vessel owned and operated by the City. The penalties ranged from $100.00 to $500.00 for each violation.

The City moved to dismiss the complaint, arguing that it was not an "owner" or "operator" of onshore facilities or vessels, because it was not a "person" as that term is defined in 33 U.S.C. 1321(a)(7).[2] The district court denied the City's motion to dismiss (Pet. App. 3a-16a). The court held that, in light of the plain meaning and structure of the Act, its legislative history and avowed congressional purpose, municipalities are "persons" liable for civil penalties pursuant to 33 U.S.C. 1321(b)(6) (*id.* at 5a-13a). The court of appeals affirmed on the strength of the district court's opinion (Pet. App. 2a).

---

[2]The City also argued in the district court that penalties may not be assessed on a "strict liability" standard without a finding of fault. This argument was not asserted on appeal and is not raised in the petition for a writ of certiorari.

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or other court of appeals, and does not otherwise warrant further review.[3]

Petitioner contends that Congress did not intend to impose on municipalities civil penalties for oil spills, and that, in its definition of "person" in 33 U.S.C. 1321(a)(7), Congress meant to exclude political entities. Both courts below disagreed with petitioner and concluded, instead, that the statutory language, legislative history, and policies of the Act demonstrate that Congress did not intend to exempt municipalities from civil penalties assessed under Section 1321(b)(6) (Pet. App. 2a, 5a-13a). More recently, the First Circuit in *United States* v. *Massachusetts Bay Transportation Authority (MBTA)*, No. 79-1512 (Feb. 4, 1980), slip op. 4, relied upon the decisions below in holding the MBTA, a political subdivision, liable for civil penalties assessed against it pursuant to Section 1321. See also *United States* v. *A/S ODDERO RADHUSGT 8*, No. 78-0762 RMT (C.D. Cal. Oct. 6, 1978) (holding that Congress intended to include cities and municipalities within the definition of "person" in 33 U.S.C. 1321).

---

[3]*United States* v. *Ward*, No. 79-394 (argued Feb. 26, 1980), also concerns the oil spill penalty provision of the Clean Water Act, but the question there is unrelated to this case. *Ward* presents the question whether a proceeding to assess civil penalties pursuant to 33 U.S.C. 1321(b)(6) is a "criminal case" within the meaning of the Self Incrimination Clause of the Fifth Amendment. That question would not arise in the case of civil penalties assessed against a municipality, to which the privilege against self incrimination does not apply. See *Ward* v. *Coleman*, 598 F. 2d 1187, 1194 n.7 (10th Cir. 1979).

The conclusion reached by the courts below and concurred in by the other courts that have considered the question is consistent with the overall goal of the Act—the elimination of all discharge of pollutants into navigable waters by 1985 (33 U.S.C. 1251(a)(1))—and with the policy of the specific section in question, "* * * that there should be *no* discharges of oil or hazardous substances into or upon the navigable waters * * *." 33 U.S.C. 1321(b)(1) (emphasis added). That result is also in accord with the broad prohibition of discharges of oil or hazardous substances into navigable waters in 33 U.S.C. 1321(b)(3). There is no exception for public entities.

Petitioner does not dispute that the City of New York is a municipal corporation, but insists that the word "corporation," which is expressly included in the definition of "person" in 33 U.S.C. 1321(a)(7), does not embrace municipal corporations. This is at odds with decisions of the Court construing "person" to extend to municipal corporations. See *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658, 687-688 (1978); *California* v. *United States*, 320 U.S. 577, 585 (1944). As the district court noted (Pet. App. 9a), the definition of "person" in Section 1321(a)(7) does not specifically exclude municipalities. On the contrary, the use of "includes" in the definition, rather than "means," strongly suggests that the enumeration is illustrative, and that other categories, not specifically listed, were also intended to be covered. See *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941).[4]

[4]Petitioner's reliance (Pet. 10-12) on cases interpreting the Securities Exchange Act of 1934 is misplaced, since the definitional section in question in those cases, 15 U.S.C. 78c(a)(9), employs the restrictive term "means" in defining "person" for purposes of that statute.

Furthermore, the district court below (Pet. App. 9a-11a) and the First Circuit in *United States* v. *MBTA*, *supra*, slip op. 4, correctly observed that if municipalities or political subdivisions were not included in the statutory definition of persons, other portions of Section 1321 would be superfluous or internally inconsistent. For example, if municipalities are not included within the meaning of "person" for purposes of 33 U.S.C. 1321, then, as a logical matter, municipalities are not subject to the requirement of reporting oil spills, pursuant to 33 U.S.C. 1321(b)(5).[5] Thus, acceptance of petitioner's position would severely frustrate implementation of the section's "comprehensive plan attempting to expedite oil pollution cleanup and to establish a workable scheme for limiting and distributing liability." *Tug Ocean Prince, Inc.* v. *United States*, 584 F. 2d 1151, 1162 (2d Cir. 1978), cert. denied, 440 U.S. 959 (1979).

Petitioner mistakenly asserts (Pet. 16) that the Coast Guard has issued regulations that exclude states and unincorporated political subdivisions from the penalty provisions of Section 1321. The pertinent Coast Guard regulations in fact contain the same definition of "person" found in Section 1321(a)(7) of the Clean Water Act, and do not exempt either states or unincorporated political subdivisions from civil penalties. See 33 C.F.R. 153.103,

[5]33 U.S.C. 1321(b)(5) provides, in pertinent part:

> Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. * * *

153.105(a)(1).[6] We assume that petitioner based its assertion on an outdated, internal Coast Guard directive (Commandant Instruction 5922.11B, issued Oct. 10, 1974) that interpreted "person" as defined in 33 U.S.C. 1321(a)(7) to include municipal and other public corporations but to exclude states and unincorporated political subdivisions. That interpretation was canceled on March 31, 1979, and is no longer internal agency policy. An agency may abandon or modify a position at variance with the controlling statute, and, indeed, it has an obligation to change an incorrect interpretation. Thus, the earlier directive does not impair the validity of the Coast Guard's current statutory construction. See *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 265-266 (1975); *Dixon* v. *United States*, 381 U.S. 68, 72-75 (1965). In any event, the agency at all times found that the term "person" included municipalities.

Finally, petitioner suggests (Pet. 20) that this case raises larger questions of federalism. To the contrary, this is a simple case of statutory construction with no constitutional overtones. Petitioner has never argued that the penalty provision of 33 U.S.C. 1321(b)(6) as applied to cities is constitutionally invalid or a transgression of limitations on federal power. The only question presented is whether Congress intended the civil penalty provision to apply to municipalities. Moreover, the money collected from the relatively small statutory penalties does not go into the federal Treasury, but into a revolving fund to

[6]Regulations of the Environmental Protection Agency regarding discharge of oil also incorporate the statutory definition from 33 U.S.C. 1321(a)(7) without specific exclusions or further elaboration. See 40 C.F.R. 110.1(f).

defray the costs of administration and cleaning up oil spills in situations where clean-up costs are otherwise not recoverable. See 33 U.S.C. 1321(k). The assessment of civil penalties merely distributes the costs of removing oil pollution and in no way threatens the separate and independent existence of the states and their political subdivisions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

ANNE S. ALMY
GAIL OSHERENKO
Attorneys

APRIL 1980

DOJ-1980-04